No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELIZABETH ANNAT, PETITIONER

v.

DANIEL B. BEARD, WARREN J. HAMILTON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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OPINION

The opinion of the court of appeals (Pet. App. 1–13) is reported at 277 F. 2d 554.

JURISDICTION

The judgments of the court of appeals were entered on April 26, 1960 (Pet. App. 14–15). The petition for a writ of certiorari was filed on July 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, having decided not to appeal from a Federal condemnation judgment in favor of

the United States, is entitled six years later to be relieved from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the judgment was erroneous and therefore the Government took private property without compensation.

RULE INVOLVED

Rule 60(b), Federal Rules of Civil Procedure, provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *

STATEMENT

The petition brings up kindred rulings in a condemnation action and an ejectment action. The United States instituted the condemnation action to acquire a large area of land in Florida for inclusion in the Everglades National Park. The petition contained a perimeter description of the entire area including the land which is here in controversy. By amendment to that petition, the United States divided the lands within the perimeter boundary into numbered tracts. The descriptions of those tracts and the supposed owners of those the Government regarded as being privately owned were set forth[1] (R. 39–49). The descriptions were in terms of township, range, and section—in accordance with the conveyances by the State to the private owners—rather than natural boundaries, and were related to an official Government map of the area which showed 640-acre sections.

Use of 640-acre sections resulted in gaps called hiatuses appearing between some townships and some ranges. That situation derived from the fact that only a part of the area had been surveyed on the ground because of its swampy condition. The remainder had to be mapped by projections from a limited number of established survey points and lines. On account of this, there existed conflicting maps of the area. Some

[1] The State of Florida had once owned all of this land. It had conveyed some to private owners. Prior to the condemnation suit, it conveyed to the United States by quitclaim deed all of the land within the perimeter boundary which it still owned.

of the parties, including petitioner, claimed under maps or plats containing 800-acre sections. Such maps tended to eliminate hiatuses by placing all or most of such land within the adjacent sections.

Among the tracts listed and described by township, range, and section in the amended petition were Tracts 317 and 337, which were stated to be owned by petitioner. The land between these two sections, which is the area directly involved here, was designated tract 268 and was described and located as a hiatus between Townships 59 and 60 and was designated as being within hiatus Township 59½ (R. 42, 57; Pet. App. 5). In the amended condemnation petition, the United States expressly claimed title to this hiatus under its deed of the entire area from the State of Florida on the ground that it had not been conveyed by the State to any private ownership. The amended petition also stated (R. 11):

> "That because of the uncertainty of descriptions of tracts of lands hereinabove described, and the Petitioner's inability, in many instances, to properly identify lands by survey according to law, as well as for other reasons, Petitioner prays for the entry of a judgment in this proceeding which will cover all lands within the perimeter boundary of the Park (notwithstanding that deeds to Petitioner to certain portions thereof may have been duly executed and delivered and recorded) and which will adjudicate that the fee simple title to all of the land described in Exhibit "A" to this Petition (as hereby amended) has vested in the United States of America subject only

to [certain specific reservations not here material].

Subsequently, a declaration of taking was filed which included most of the tracts. It did not include tracts claimed by the United States or tracts as to which compensation had been settled. The sum of $45,000 was deposited as estimated just compensation for Tracts 317 and 337. As shown by an attached plat, that deposit did not apply to the hiatus area (Tract 268) between those tracts (R. 57; Pet. App. 5).

Petitioner answered the amended petition, stating that the land claimed by her contained 31,860 acres (R. 70). This included the hiatus area since she claimed that there was no hiatus. She denied "the allegation of Petitioner that any part or portion of the land herein described is sovereignty land" and alleged that her property was "not properly or sufficiently described by petitioner, and that no adequate survey has been made of this or other property within the area designated as Everglades National Park, but that petitioner, on July 3rd, 1947 and January 6, 1948, and dates subsequent thereto compiled, published and circulated maps on said property" (R. 69–70). Other landowners also challenged the validity of this hiatus which, as the Government claimed, extended for some distance.

Since it was necessary to settle the issue of ownership, location and acreage before valuation proceedings could be held of judgment in condemnation entered, the district court conducted a pretrial hearing to determine whether the Government's map con-

taining the 640-acre sections should be authenticated as an accurate representation of the physical location on the ground of the property in the Park area or whether the defendant's maps containing 800-acre sections should govern. On July 2, 1951, following a lengthy trial (922 pages of reporter's transcript) at which nine counsel for several landowners, including petitioner, actively participated, the district court found and ordered that the Government's map showing the location of the lands sought to be acquired should govern in the trial to determine just compensation (R. 73-79).

On May 26, 1952, following a jury trial, the court entered a "Final Judgment" awarding compensation for 23 tracts, including Tracts 317 and 337, and vesting title in the United States (R. 81-90). The owners of three tracts (not including petitioner) appealed on November 7, 1952, from that judgment on the ground that the district court had erred in adopting the Government's maps. On April 5, 1954, the Fifth Circuit reversed the district court, holding that it should have authenticated and used a map containing 800-acre sections, which had been in use for thirty-six years as a basis for conveyances. *Paradise Pawnee Land Co.* v. *United States*, 212 F. 2d 170.

In the meantime, on April 13, 1953, an overall, single final judgment, as prayed for in the Government amended petition, was entered which embraced (a) all the tracts as to which "Final Judgments" had already been "entered herein," including Tracts 317 and 337; (b) all tracts (including hiatus Tract 268) as to which the court found that "the allegations of

the Petition for Condemnation, as amended, are true" so that they were conveyed to the United States by the deed from Florida; and (c) all tracts voluntarily conveyed by private owners to the United States (R. 100–126). On that basis, the court ordered that the United States was the owner of all lands within the perimeter boundary of the Park, which it set forth by courses and distances.

Four years later, on April 15, 1957, petitioner filed the present ejectment action against Daniel B. Beard, the Park Superintendent, to acquire possession of the land embraced in Tract 268 and for $100,000 estimated profits. The Superintendent answered setting forth, among other defenses, the condemnation proceedings which embraced this land and the final judgments of May 26, 1952, and April 13, 1953, holding that petitioner had no title and that title was in the United States (R. 11–13).[1] On July 25, 1958, petitioner filed a motion in the condemnation action under Rule 60(b)(4) and (6), F.R. Civ. P., to be relieved from the judgment of April 13, 1953 (R. 141). The district court denied this motion and, in the ejectment action, granted defendants' motion for summary judgment (R. 25–26, 157).

On appeal, the court of appeals affirmed both rulings of the district court. It held that petitioner was

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[1] The compensation owing the owners who successfully appealed was later settled by agreement.

This action was commenced in the State Court for Dade County, Florida, and later removed to the federal district court in accordance with 28 U.S.C. 1442(a)(1) and 1446. Daniel B. Beard was originally the only defendant named. Subsequently, petitioner added Warren J. Hamilton, who succeeded Beard as Park Superintendent.

bound by the judgment of May 26, 1952, under ordinary principles of *res judicata*. The court further held that, even assuming that petitioner "would have obtained the same result as did the appealing defendants" in the *Paradise Prairie Land Co.* case, *supra* (Pet. App. 9), she is not entitled under Rule 60(b)(4) or (6) to be relieved from the judgment which she chose not to appeal.

ARGUMENT

Petitioner is bound by the judgment of May 26, 1952, declaring that the land in question belongs to the United States. The only basis for relief from such a final judgment is under Rule 60(b) of the Federal Rules of Civil Procedure, *supra*, p. 2. But Rule 60(b) is clearly not applicable.

1. Petitioner's motion under Rule 60(b) relied on clauses (4) and (6). Clause (4), however, requires that the prior judgment be void. Here, even if we assume, as did the court of appeals, that the district court judgment was erroneous, the judgment was still not void. Otherwise, Rule 60(b)(4) would, without any time limitation, substitute for appeal since by hypothesis all judgments which would be reversible on appeal are erroneous. Likewise, Rule 60(b)(6), which allows relief for "any other reason justifying relief from the operation of the judgment"—may not be used as a substitute, six years later, for a deliberate decision not to appeal. As this Court held in a similar situation in *Ackermann* v. *United States*, 340 U.S.

193, 198;[1] "Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Accord, *Title* v. *United States*, 263 F. 2d 28, 30-31 (C.A. 9), certiorari denied, 359 U.S. 989; *Collins* v. *City of Wichita, Kansas*, 254 F. 2d 837 (C.A. 10); *Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 776, 779-780 (C.A. 5); *Berryhill* v. *United States*, 199 F. 2d 247 (C.A. 6); cf. *Sunal* v. *Large*, 332 U.S. 174;[2]

[1] Actually, petitioner has far less justification than did petitioners in *Ackermann* in asking to be relieved from the earlier judgment. There, allegations were made that pressing financial considerations influenced the decision not to appeal, and that the Ackermanns relied on the advice of a government official which carried with it the implied claim that governmental interference frustrated appeal. The dissenters in *Ackermann* believed that these allegations, if proved, entitled relief from the judgment that did not disagree with the necessity of the fundamental proposition that a freely made decision not to appeal may not be remedied at a later day by a motion under Rule 60(b). Since, petitioner in this case offers no excuse for failure to appeal, she has no basis, even according to the view of the dissenters in *Ackermann*, for relief under Rule 60(b).

Keilbar was a co-defendant of the Ackermanns who appealed from the judgment and won a reversal. Petitioner is in a like situation since landowners similarly situated were successful on appeal in the *Paradise Process Land Co.* case, *supra*.

[2] A similar issue, in a denaturalization context, is now before the Court in *Polites* v. *United States*, No. 25, this Term, certiorari granted, 361 U.S. 958, and will be more extensively discussed in the brief which the Government will file in that case. Accordingly, the Court may wish to withhold action on this petition until the decision in *Polites*.

Petitioner, however, contends (Pet. 2, 5, 9, 10) that the United States has taken her property without due process of law and without compensation and that both courts below overlooked these "constitutional aspects of the cause." But even if these allegations were true, errors by the district court on constitutional issues, like on all other issues, must be remedied by appeal, not by moving, six years after judgment, under Rule 60(b). Since she chose not to appeal for reasons which, as the court of appeals said, were "no doubt regarded by Mrs. Annat as sufficient" (Pet. App. 10), it was her responsibility, not the Government's, that she did not receive the same relief as the appellant landowners in *Paradise Prairie Land Co.* v. *United States*, *supra*.

2. Petitioner asserts (Pet. 10) that Tract 268 "was not condemned, it was not included in the Declaration of Taking, there was no compensation deposited or paid, no trial as to its value, no order granting possession and no adjudication as to its ownership save and except an 'ex parte judgment' entered without notice to or knowledge of the owner." Those assertions are either erroneous or ineffectual. Tract 268 (the hiatus) was included in the condemnation complaint, petitioner's claim of ownership was fully litigated at the pre-trial hearing, and the judgment of May 26, 1952, adjudicated petitioner's claim of ownership to this tract. The judgment was final and appealable as to petitioner's ownership because it had the effect of dismissing her from the case as to Tract 268.

Tract 268 was not included in the declaration of taking because the filing and extent of a declaration of taking are optional with the Government and, in this instance, the Government believed that it already had title to the tract. For that reason, also, there was no occasion for depositing estimated compensation or requesting an order for possession. Similarly, there was no reason for including Tract 268 in the valuation trial, since the Government's map, which the court adopted, showed that petitioner did not own Tract 268, no other claimant was of record or appeared, and the court had already determined that it was embraced in the deed to the Government from the State.

Petitioner impugns the overall judgment of April 13, 1953, stating that the State of Florida had conveyed Tract 268 to the United States as "an ex parte judgment entered without notice to or knowledge of the owner." Pet. 10. But this judgment did not affect or alter the earlier judgment of May 26, 1952, which awarded petitioner compensation for Tracts 317 and 337, in accordance with the order of July 2, 1951, which in turn had determined that Tracts 317 and 337 were the only acreage which the State conveyed to petitioner's predecessor. In terms, the April 13, 1953, judgment referred to the earlier May 26, 1952, judgment as a "Final" judgment and as a matter already done. The purpose of the April 13, 1953, judgment was obviously to meet the request in the Government's petition for a single, omnibus judgment embracing all land within the perimeter boundary of the Park (see the Statement, *supra*, pp. 4-5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied. However, in view of the pendency of the *Polites* case (No. 25) involving a similar issue, the Court may wish to defer action on this petition until the disposition of that case.[7]

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[7] See footnote 6, *supra*, p. 9.

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